# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 32

CHILDREN'S HOSPITAL AND RESEARCH CENTER OF OAKLAND, INC. d/b/a CHILDREN'S HOSPITAL OF OAKLAND<sup>1</sup> (Oakland, CA)

**Employer** 

and

NATIONAL UNION OF HEALTHCARE WORKERS

Case 32-RC-5617

**Petitioner** 

and

SEIU UNITED HEALTHCARE WORKERS – WEST

Intervenor/Incumbent Union

# REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Children's Hospital and Research Center, Inc. d/b/a Children's Hospital of Oakland, herein called the Employer, operates an acute care hospital in Oakland, California where it is engaged in the business of providing healthcare services. On February 2, 2009, National Union of Healthcare Workers, herein called the Petitioner, filed a petition in Case 32-RC-5617 with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent a unit of approximately 420 technical and non-technical

<sup>&</sup>lt;sup>1</sup> The name of the Employer appears as stipulated at the hearing.

employees who are currently represented by SEIU United Healthcare Workers – West, herein called the Intervenor/Incumbent Union.

A hearing officer of the Board held a hearing in this matter on April 8, 2011.<sup>2</sup>
Petitioner, the Employer, and the Intervenor/Incumbent Union appeared at the hearing, and they have each filed post-hearing briefs with me, which I have duly considered.

As evidenced at hearing and in the post-hearing briefs, there is disagreement among the parties over the appropriateness of the petitioned-for unit. The Employer and the Petitioner agree that the appropriate unit is the historical unit made up of the employees listed in the petition with the addition of employees employed in the cook classification. In contrast, the Intervenor/Incumbent Union argues that the only appropriate unit would include the historical unit, including cooks, as well as approximately 250 employees employed in approximately 21 additional classifications.

I have carefully considered the evidence and the arguments presented by the parties on this issue. As set forth below, I have concluded that the petitioned-for unit with the addition of the cooks is an appropriate unit. Accordingly, I am directing an election in that unit.

# **Background**

The Intervenor/Incumbent Union has represented a bargaining unit of the Employer's non-technical, non-professional employees for decades. In 2000, a group of the Employer's technical workers voted in a Board election to join the existing bargaining unit. The expanded unit was reflected in the parties' collective-bargaining agreement that was effective from February 21, 2005 through April 30, 2009. At some

<sup>&</sup>lt;sup>2</sup> The delay between the filing of the petition and the holding of the hearing resulted from the investigation and resolution of a series of blocking unfair labor practice charges filed by the Intervenor/Incumbent Union.

point during the term of that expired agreement, the Employer and the Intervenor/Incumbent Union agreed to add the cook classification to the bargaining unit, and the Employer's and the Intervenor/Incumbent Union's most recent collective-bargaining agreement, herein called the Agreement, effective by its terms from December 8, 2010 through April 30, 2014, specifically includes the cook classification.

In support of its position, the Intervenor/Incumbent Union presented evidence that the petitioned-for unit employees share common working conditions, common or interrelated work functions, common supervision, and common benefits with the unrepresented employees it seeks to add to the historical unit. However, during bargaining for the Agreement, the Intervenor/Incumbent Union never proposed to add any of the 21 classifications of employees to the historical bargaining unit that it now contends must be added. Also, none of the 21 classifications of employees that the Intervenor/Incumbent Union is now arguing must be added to the historical bargaining unit were created after December 18, 2010, the effective date of the Agreement. Furthermore, the Intervenor/Incumbent Union refused to take the position that the historical unit is an inappropriate unit or to enter a stipulation that it was an appropriate unit and it presented no evidence to show either that the historical unit is repugnant to the Act or that compelling circumstances have rendered the historical unit inappropriate. Rather, the Intervenor/Incumbent Union repeatedly asserted at hearing and in its posthearing brief that the historical unit should be expanded to include employees employed in the additional classifications in order to allow them to vote with unit employees with whom they share a community-of-interest.

## **ANALYSIS**

The only issue before me is whether the historical bargaining unit as set forth in the Agreement is an appropriate unit. As noted above, the Employer and the Petitioner contend that that the historical unit, which includes employees employed in the cook classification, is an appropriate unit while the Intervenor/Incumbent Union contends that the historical unit must include approximately 250 now unrepresented employees in approximately 21 job classifications because they arguably share a sufficient community-of-interest with employees represented by the Intervenor/Incumbent Union to warrant their inclusion.

It is well-established that the existence of significant bargaining unit history weighs heavily in favor of a finding that a historical unit is appropriate. "The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate." Children's Hospital of San Francisco, 312 NLRB 920, 929 (1993), and Trident Seafoods, Inc., 318 NLRB 738 (1995). Moreover, that burden is a heavy one requiring "compelling circumstances" to overcome the significance of bargaining history. Id. Furthermore, the Board has held that units with extensive bargaining history should remain intact unless repugnant to the Act's policies. Ready Mix USA, Inc., 340 NLRB 946, 947 (2003); P.J. Dick Contracting, 290 NLRB 150, 151 (1988); ADT Security Services, Inc., 255 NLRB No. 223 (2010)(relocation of bargaining unit to a new facility upon closure of the old facility was insufficient to constitute compelling circumstances to overcome the significance of bargaining history at the old location).

The Intervenor/Incumbent Union's position on this issue ignores the relevant Board law and relies solely on the Board's community-of-interest standard, which is insufficient when assessing the appropriateness of a historical bargaining unit. Thus, in Southern Power Company, 353 NLRB 1085, 1086 (2009), the Board reversed the judge's finding that the historical unit was not an appropriate unit and noted that community-of-interest factors relied on by the judge did not constitute "compelling circumstances" sufficient to disturb the union's historical representation of employees in the existing unit. In that regard, the Board usually applies the community-of-interest and plant-wide unit tests only when delineating units of previously unrepresented employees. See Canal Carting, Inc., 339 NLRB 969 (2003)(the Board reversed the regional director and found that rather than pursue solely a community-of-interest analysis, the regional director should have considered whether compelling circumstances warranted disturbing the historical bargaining units).

In these circumstances, even assuming there to be a substantial community-ofinterest between the historical unit employees and the employees employed in the 21
classifications sought to be included in the historical unit, I find that the
Intervenor/Incumbent Union has failed to meet its burden of showing that the historical
unit is no longer appropriate. Accordingly, I further find that the historical bargaining
unit represented by the Intervenor/Incumbent Union, as set forth in the Agreement, is an
appropriate unit for purposes of collective-bargaining. See *Met Electrical Testing, Co.*,
331 NLRB 738 (1995), enfd. 101 F.3d 111 (D.C. Cir, 1996).

## **CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.<sup>3</sup>
- 2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
- 3. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
- 4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
- 5. The parties stipulated, and I find, that the Intervenor/Incumbent Union is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>&</sup>lt;sup>3</sup> In this regard, I specifically affirm the hearing officer's rulings to: (1) grant the Employer's motion to revoke the Intervenor/Incumbent Union's subpoena duces tecum issued to the Employer prior to the start of the hearing for documents to establish a community-of-interest between the petitioned-for unit and the historically excluded employees; (2) to disallow the Intervenor/Incumbent Union to put on two additional witnesses regarding the degree of contact between the historical unit employees and the historically excluded employees; and (3) to deny the Intervenor/Incumbent Union's request that the hearing officer issue additional subpoenas ad testificandum to two of the Employer's managers who were not present at the hearing for their testimony regarding the community-of-interest between the historical unit employees and the historically excluded employees. The Intervenor/Incumbent Union was asked for an offer of proof as to what the subpoenaed documents and additional witnesses would establish and it responded solely that the evidence would show that the non-unit employees which it seeks to include in the unit share a community-of-interest with employees employed in the historical unit. Since, as indicated above, the community-of-interest analysis is insufficient, in the absence of evidence of compelling circumstances, to warrant disturbing the historical unit, the hearing officer's rulings on these matters were not in error.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time CCSTs, Central Processing Techs I, Central Processing Techs II, Critical Care Support Techs, Dishwashers, Food Service Workers, Stores Clerks, Head Housekeeping Aides, Housekeeping Aides, Functional Hospital Assistants, Linen Workers, LVNs, Patient Care Assistants, Rehabilitation Aides, Ward Clerks, Cooks, Medical Assistants, Clinical Lab Assistants I, Clinical Lab Assistants II, Clinical Lab Assistants III. Research Lab Assistants I. Research Lab Assistants II, Nuclear Med Techs, Sonographer Trainees, Sonographer Technician, Dedicated Lab Sonographers I, Dedicated Lab Sonographers II, ECG/Holter Techs, Lead Neuro Techs, Neuro Techs I, NeuroTechs II, EEG Tech Trainees, RHITs I, RHITs II, Anesthesia Technician, OR Tech Trainees, OR Techs, Respiratory Care Practitioners I, Respiratory Care Practitioners II, RCP Transports, Equipment Technician, Pulmonary Function Techs I, Pulmonary Function Techs II, Pulmonary Function Techs III, Instrumentation Techs II; excluding all other employees, guards, and supervisors as defined in the Act.

There are approximately 420 employees in the unit.

# **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective-bargaining by National Union of Healthcare Workers; SEIU, United Healthcare Workers – West; or neither. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

## **Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as

strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

# **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be

used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, on or before **July 13, 2011.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website, **www.nlrb.gov**, by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

# **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has

To file the eligibility list electronically, go to <u>www.nlrb.gov</u>, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

# RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570 -0001. This request must be received by the Board in Washington by 5 p.m., EDT on July 20, 2011. The request may be filed electronically through the Agency's web site, www.nlrb.gov, 5 but may not be filed by facsimile.

Dated: July 6, 2011

George P. Velastegui, Acting Regional Director

National Labor Relations Board

Region 32

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1301 Clay Street, Suite 300N Oakland, CA 94612-5211

To file the request for review electronically, go to <u>www.nlrb.gov</u>, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.

# POSTING OF NOTICE OF ELECTION

# **PART 193 - OTHER RULES**

1. The authority citation for 29 CFR Part 163 is revised to read as follows:

Authority. Sec. 6 National Labor Relations Act as amended (29 U.S.C. 151, 158) and Section 553 of the Administrative Procedure Act (5 U.S.C. 500.553).

2. Part 103 is amended by adding Subpart B, consisting of Sec. 103.20 to read as follows:

# **Subpart B - Election Procedures**

# Sec. 103.20 Posting of Election Notices

- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. <u>In all cases the notices shall remain posted until the end of the election.</u>
- (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
- (c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.
- (d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Sec. 102.69(a).